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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 217

OCTOBER TERM, 1962.

JOSEPHINE GOSS et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

HENRY C. MAXWELL, JR., et al.,
Petitioners,

v.

THE COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE, et al.

BRIEF

In Opposition to the Petition for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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BRIEF

In Opposition to the Petition for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.

The respondents, The County Board of Education of Davidson County, Tennessee, et al., file this their brief in opposition to the petition for writs of certiorari to the United States Court of Appeals for the Sixth Circuit.

QUESTIONS PRESENTED.

As respects these respondents, the questions are:

1. Whether the petitioners, Henry C. Maxwell, Jr., et al., are deprived of their rights under the Fourteenth Amendment by the approval of a desegregation plan adopted for the public schools in Davidson County and approved by the District Court and the Circuit Court of Appeals, which provides among other things that transfer applications will be given consideration when such transfer is practicable and consistent with sound school administration and when "good cause therefor is shown" and which defines as one of those grounds of "good cause":

> "a. When a white student would otherwise be required to attend a school previously serving colored students only.
>
> b. When a colored student would otherwise be required to attend a school previously serving white students only.
>
> c. When a student would otherwise be required to attend a school where the majority of students in that school, or in his or her grade, are of a different race."

2. Were the petitioners entitled to disrupt the desegregation plan approved by the District Court and by the Circuit Court for the Davidson County school system so as to have exceptions made in their favor?

STATEMENT OF THE CASE.

Following the initial hearing in the case of **Maxwell v. The County Board of Education** and pursuant to the direction of the District Court to formulate a plan for the orderly desegregation of the Davidson County schools, the

County Board of Education of Davidson County, Tennessee, appointed a special committee of its membership, to-wit, Ferriss C. Bailey, Frank White and S. L. Wright, Jr., which committee worked with the staff of the Board of Education to compile and submit the plan (R., Maxwell 64a).* This plan was then submitted to the entire Board of Education of Davidson County, which adopted it and submitted it to the Court (R., Maxwell 64a).

The plan, as submitted originally by the Board, abolished segregation based on race for Grade One in the Davidson County School System for the scholastic year beginning September, 1961, with an additional year to be desegregated each subsequent year thereafter; a zoning plan was adopted based upon the location of the school buildings, transportation facilities, scholastic population, etc., without reference to race; subject to exceptions necessary in the administration of the school system, thereafter the students in each desegregated grade would attend the school designated for their zone, unless transferred pursuant to their parents' request for good cause; transfers were permitted to be **applied for** and **consideration given** when made by parents or persons standing in the relationship of parents, provided **good cause** for such was shown and such transfer was **practicable** and **consistent with sound school administration**; and **among other conditions** upon which transfers could be granted by request, the plan provided that where a student would be required to attend a school where such student was in the extreme race minority, transfer requests would be **considered** (R., Maxwell 69a-71a).

Following a full hearing the Court accepted the plan as submitted by respondents, excepting that the Court re-

* References to the appendix of petitioners in the Maxwell case will be followed with a suffix "a," and references to respondents' appendix with the suffix "b."

quired the first four grades, rather than the first grade, to be desegregated effective with the commencement of the January, 1961, Term, in order to cause the Davidson County plan to become current with the plan in the educational system of the City of Nashville (R., Maxwell 132a).

The plan as proposed by the Respondents and as approved by the Court, with modifications as above noted, was supported by the testimony of persons experienced in the operation of the school systems within Davidson County, Tennessee. The first of these witnesses, the Honorable Ferriss C. Bailey, had served as the Chairman of the Committee of the School Board for the formulation of the plan. Mr. Bailey is an attorney and has served on the Board of Education of Davidson County for more than seventeen years, and prior to that time served on the Board of Education of the City of Nashville, located within Davidson County, for a period of six years (R., Maxwell 1b-3b). Mr. J. E. Moss has served for twelve years as the Superintendent of the Davidson County Schools and prior to that had served for twenty-five years as a teachor and supervisor in the Davidson County school system (R., Maxwell 3b-4b). Mr. William H. Oliver has served as Superintendent of the school system of the City of Nashville for the last two years plus, and prior to that had served as a principal and teacher in the school system of the City of Nashville for a period of thirty-three years (R., Maxwell 19b). Mr. Floyd Detchon has served for twenty-seven years with the school system of Davidson County in the various capacities of principal and attendance and research supervisor (R., Maxwell 25b). Mr. Melvin B. Turner has served in the school system of Davidson County for twelve years as Superintendent of Transportation (R., Maxwell 28b). The witness, Mr. Emmett Pettie, has served for a period of fourteen years with the Davidson County school system as a teacher and school psychologist (R., Maxwell 35b-36b). Mr. A. E.

Wright, who likewise testified in support of the plan, has served for a period of thirty-five years with the Davidson County school system as a teacher, coach, principal, supervisor and assistant superintendent (R., Maxwell 44b-45b). The other witness offered by the respondents in support of the plan and who assisted in the work of the staff in formulation of the plan was Mr. Joseph R. Garrett, who has served for twelve years with the Davidson County system in child welfare and attendance (R., Maxwell 46b).

As contrasted with these witnesses who had had daily contact with both the community and the school system of Davidson County, the petitioners produced the testimony of a Dr. Long, who had never taught or supervised in any public educational institutions in either Davidson County or elsewhere (R., Maxwell 227b); Dr. Eugene Weinstein, who had never taught or worked in or for or attended a public school in this area (R., Maxwell 41b); and Dr. J. Masuoka, whose experience was in general a study of race relations problems in Japan (R., Maxwell 42b-44b).

There are two school systems in Davidson County, Tennessee. One is the school system of the City of Nashville, which serves a school population of approximately 30,000 pupils (R., Maxwell 19b-20b). The other school system is the school system operated by the respondent, County Board of Education of Davidson County, Tennessee, which serves that portion of Davidson County outside of the City of Nashville and serves a school population of approximately 47,000 pupils (R., Maxwell 77a). The City of Nashville School System Plan for gradual desegregation was approved by the same District Court as considered the instant case and was approved by the Circuit Court for the Sixth Circuit in the case of **Kelley v. Board of Education**, 270 F. 2d 209 (Cert. denied, 361 U. S. 924).

As appears from the report of the Special Committee of the Davidson County School Board working with the staff

and from the testimony of the witnesses, there were many problems which had to be considered by the respondent, Board of Education, in order to formulate a plan which might work in Davidson County, Tennessee. One of the problems to be considered was the fact that the Davidson County School System was terribly over-crowded at the time and in fact and in spite of an active building program, seventy portable or temporary buildings were being used to house the excess of pupils (R., Maxwell 7b, 15b-16b, 25b-26b). Out of the School System of Davidson County, forty-four of the schools would be affected by a desegregation plan (R., Maxwell 9b). Another factor was the concentrations of the Negro population and the white population in the County outside of the City, which would be the area served by the Davidson County School System (R., Maxwell 66a, 67a). In addition, the Davidson County School System offers transportation to its students residing more than one and one-fourth miles from the school attended, and any alteration of the existing school system would create transportation problems (R., Maxwell 10b-11b). The transportation problem was not only a problem of administration and operation of the school bus system, but likewise involved discipline on the buses where the driver was charged not only with the operation of the bus, and the safety of its operation, but the discipline of the children riding the bus, which disciplinary problems would increase with integration (R., Maxwell 10b-11b, 29b-30b).

Another important factor to the School Board, which was considered by it, was the custom in the community over many years of a segregated school system, which had to be overcome (R., Maxwell 14b, 17b, 18b) and the fact that friction would arise among the student bodies by too rapid a departure from the status quo (R., Maxwell 60a, 67a).

In addition, educational wise any change of a school for any cause has an adverse effect on the pupil (R., Maxwell 13b-17b, 21b), and precipitous action would cause community disturbances, property loss and grave administrative difficulties (R., Maxwell 65a). The School Board in preparing and offering the plan also considered the variance in achievement levels at higher school grade levels as between the Negro school population and the white school population and its effect on the entire school population and the educational system from an integrated system (R., Maxwell 16b, 18b, 22b, 37b-40b). Any change in the school system for any cause and for any reason requires a great amount of administrative work, which is time consuming, and the greater the change the more time required to work out the administrative problems (R., Maxwell 17b).

Another factor which strongly influenced the Board in recommending the plan adopted, with certain modifications, by the District Court for orderly integration was that the City of Nashville plan, approved by the Circuit Court in the **Kelley** case, *supra*, was familiar to the residents of the area, the teachers in the school systems and the pupils in the school systems and had been accepted generally by the local populace (R., Maxwell 20b).

Based upon these factors this respondent, the County Board of Education of Davidson County, Tennessee, offered a plan identical with the plan previously offered by the City of Nashville and which had been in operation in the community for a period in excess of three years. The only real modification made by the District Court was to increase the number of grades to start off the plan from the first grade to the first four grades in order that the Davidson County plan might be coextensive in time with the City of Nashville plan.

ARGUMENT.

QUESTION NO. 1.

Whether the petitioners, Henry C. Maxwell, Jr., et al., and deprived of their rights under the Fourteenth Amendment by the approval of a desegregation plan adopted for the public schools in Davidson County and approved by the District Court and the Circuit Court of Appeals, which provides among other things that transfer applications will be given consideration when such transfer is practicable and consistent with sound school administration and when "good cause therefor is shown" and which defines as one of those grounds of "good cause":

> "a. When a white student would otherwise be required to attend a school previously serving colored students only.
>
> b. When a colored student would otherwise be required to attend a school previously serving white students only.
>
> c. When a student would otherwise be required to attend a school where the majority of students in that school, or in his or her grade, are of a different race."

The transfer provisions of the plan approved by the District and Circuit Courts here challenged by the petitioners is identical with the section of the plan approved in the case of **Kelley v. Board of Education of City of Nashville, etc.**, 270 F. 2d 209. We do not feel that any clearer statement of the fallacy of the petitioners' argument could be made than the statement made by the Sixth Circuit Court, speaking through Judge McAllister, commencing at page 228 of that opinion, where the transfer provision is discussed and which, for the Court's convenience, we here quote:

"[6] We come, then, to the transfer provision of the plan, allowing the voluntary transfer of white and Negro students, who would otherwise be required to attend schools previously serving only members of the other race; and allowing the voluntary transfer of any student from a school where the majority of the students are of a different race. This provision does not fall within the ban of the maintenance of segregated public schools by cities where permitted—though not required—by statute, such as was condemned by the Supreme Court in Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873. The district court, in the instant case, considered that, in accordance with the reasoning in Briggs v. Elliott, D. C. S. C., 132 F. Supp. 776, 777, the transfer provisions did not violate the equal protection clause of the Fourteenth Amendment. In the Briggs case, it was declared, as we have heretofore mentioned, that the Supreme Court has not decided that the states must deprive persons of the right of choosing what schools they attend, but that all it has decided is that a state may not deny to any person, on account of race, the right to attend any school that it maintains. 'This,' said the court, as we have previously quoted, on another aspect of this case, 'under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races attend different schools. * * *' Appellants say that the transfer plan is only a scheme to evade the decisions of the Supreme Court. In Cooper v. Aaron, 358 U. S. 1, 17, 78 S. Ct. 1401, 1409, 3 L. Ed. 2d 5, it was said: 'In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this court in the Brown case, can neither be nulli-

fied openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." There is no evidence before us that the transfer plan is an evasive scheme for segregation. If the child is free to attend an integrated school, and his parents voluntarily choose a school where only one race attends, he is not being deprived of his constitutional rights. It is conceivable that the parent may have made the choice from a variety of reasons—concern that his child might otherwise not be treated in a kindly way; personal fear of some kind of economic reprisal; or a feeling that the child's life will be more harmonious with members of his own race. In common justice the choice should be a free choice, uninfluenced by fear of injury, physical or economic, or by anxieties on the part of a child or his parents. The choice, provided in the plan of the Board, is, in law, a free and voluntary choice. It is the denial of the right to attend a nonsegregated school that violates the child's constitutional rights. It is the exclusion of children from such a school that 'generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,' as observed in Brown v. Board of Education, 347 U. S. 483, 494, 74 S. Ct. 686, 691, 98 L. Ed. 873. Such may be the tragic result, when children realize that society is imposing a restriction upon them because of their race or color. The Supreme Court remarked in the foregoing case that the effect of the separation of students because of race was 'well stated' by the district court in the case, then on review, when it declared:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored

children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'

Nevertheless, as stated in Brown v. Board of Education, D. C., 139 F. Supp. 468, 469, 470, subsequent to the decision of the Supreme Court in the prior Brown case:

'Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.

'If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live.'

[7] While, in the instant case, the parent makes the choice for the small child, that is the only reasonable method, if such a choice may be made. We see no deprivation of right, under the evidence before us. Doubtlessly, fewer Negro children, or their parents, will avail themselves of the transfer provisions, as grade after grade becomes integrated, and more Negro children attend such desegregated schools as time goes on. We are not informed by the record how much such attendance has increased with the additional desegregation that has taken place since the

> hearing. But if it should appear, upon a showing, that there are impediments to the exercise of a free choice, and that a change should be made in the plan to carry out, in good faith, and with every safeguard to the children's rights, the mandate of the Supreme Court, the district court, having retained jurisdiction during the entire period of the process of desegregation under the Board's plan, shall make such modification in its decree as is just and proper. On the record before us, the judgment of the district court does not deprive any of the children of equal protection under the Fourteenth Amendment."

Certainly there is nothing in this record to indicate that there are any impediments to the exercise of a free choice by parents, but as pointed out by the Circuit Court in the **Kelley** case, the District Court has retained jurisdiction during the entire period of the process of desegregation under the plan, and in the event such should appear, the District Court could make such modification as became necessary.

Petitioners rely upon the case of **Boson v. Rippy**, 285 F. 2d 43 (Fifth Cir. 1960). The ultimate result in that case we confess is in conflict with the decision of this Court in the **Kelley** case. A careful reading of the **Boson** case, however, and especially the supplemental opinion in the case, would indicate that the United States Court of Appeals for the Fifth Circuit actually deleted the transfer provision from the plan because such would apply a rule of law to the desegregated public schools from the Dallas School District different from that applicable to other public schools in the State of Texas. That question is not applicable here. On the question of classification according to race, the United States Court of Appeals for the Fifth Circuit said only that:

> "We are so **doubtful** of the validity of the provisions of paragraph 6 that we think they should not be included in the plan."

This doubt seems to have been predicated upon the notation by the three members of the Supreme Court of the United States who thought certiorari should be granted in the **Kelley** case in that the transfer provision constituted "an absolute" ground for transfer of students.

Such a conclusion could result only from a failure to consider the entire plan. Section 4 of the plan as approved by the District Court in both this case and in the **Kelley** case (R., Maxwell 70a), provides only that transfer applications will be **given consideration** when such transfer is practicable and consistent with sound school administration and when "good cause therefor is shown."

Section 5 then defines one of the "good causes" and is the section complained of. This, however, does not make it an "absolute" ground for transfer, but, on the contrary, means that it is a basis or ground which may be given "careful consideration" by the school board and which may be the basis for transfer when such is practicable and consistent with sound school administration.

The **Boson** case further overlooks the fact that while three members of the Supreme Court of the United States desired to grant certiorari on the transfer provision, the majority of the Supreme Court did not desire to grant such certiorari and accordingly certiorari was denied when the identical question was before the Supreme Court of the United States in the case of **Robert W. Kelley et al. v. Board of Education of the City of Nashville**, 361 U. S. 924, 80 S. Ct. 293, 4 L. ed. 2d 240.

QUESTION NO. 2.

Were the petitioners entitled to disrupt the desegregation plan approved by the District Court and by the Circuit Court for the Davidson County school system so as to have exceptions made in their favor?

The effect of petitioners' argument on Question No. 2 is that any plan which does not immediately admit all Negroes who desire to attend desegregated schools is an invalid plan; this for the reason that if the particular petitioners are permitted to attend the school of their choice so would any other parties making application and thus the plan would be destroyed. Such was recognized by the District Court.

No challenge has been made of a year by year plan of desegregation as such. Therefore, we will not attempt to justify the same, although we feel from the evidence adduced and as set forth in the Statement of the Case and as found by the Court, that such a plan was one which complied with the mandate of this Honorable Court for good faith compliance at the earliest practicable date, but recognizing the public interest.

We respectfully submit that unless this Honorable Court in the **Brown** case (**Brown v. Board of Education**, 349 U. S. 294), had recognized the necessity of flexibility in reconciling public and private needs this Court would have entered a decree immediately desegregating all classes in all public schools. On the contrary, this Court, speaking through Mr. Chief Justice Warren, said:

> "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling **public** and **private** needs. These cases call for the exercise of these

traditional attributes of equity power." (Emphasis ours.)

Thus we see that this Honorable Court recognized that some private individuals might not be satisfied with a plan which was adopted for the public good. Such was recognized by the District Court in this case, as it was in the case of **Kelley v. The Board of Education of the City of Nashville, etc.**, which was subsequently approved in 270 F. 2d at 209.

Such was likewise recognized by the Court of Appeals for the Fifth Circuit in the case of **Orleans Parish School Board v. Bush**, Fifth Circuit, 242 F. 2d 156, in the following language:

"... a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification by race might well warrant the allowance by the trial court of time for such reasonable steps in the **process** of desegregation as appeared to be helpful in avoiding unseemly confusion and turmoil." (Emphasis ours.)

For the reason set forth in the Statement of the Case, which we will not restate, the Trial Court here found that reasonable time was necessary in the process of the desegregation in order to avoid confusion and turmoil.

Those experienced in education in the City of Nashville and Davidson County recognized that such a plan as was here offered was necessary in order to avoid turmoil and confusion. The only opposing evidence was the theoretical testimony of those individuals who, while they had studied the subject of race relations, had had no direct contact with, and were not familiar with from their own personal experiences, the situation in Davidson County. Either the

plan is a "good faith compliance at the earliest practicable date" and should be approved without exceptions being made which would have the effect of disrupting the plan and destroying it as a plan or in the alternative the plan itself should be rejected by this Court in violation of the very principle which this Court has already established. We submit that it is a good faith compliance when considering problems related to administration, arising from the physical condition of the school plan, the school transportation system, personnel, revision of school districts and attendance areas into compact units, as well as overcoming deep-seated customs of the area, and that an attempt by petitioners to in effect destroy such a plan because of the "private" interest of a few individuals should not be permitted.

The District Court for the Sixth Circuit in the case of **Clemons v. Board of Education of Hillsboro, Ohio**, 228 F. 2d 853, pointed out that "good faith compliance at the earliest practicable date" did not require an immediate transition, regardless of the practical problems involved, and recognized that such practical problems would exist and that the primary responsibility for the solution of the same was with the school authorities.

In view of these cases we feel that the citation to other cases recognizing and approving desegregation on a year by year basis is not necessary. This case has been retained in the District Court, as is proper. In the absence of some change in conditions and circumstances so as to require a change in the order of the District Court and a speeding up of the desegregation plan, frankness requires us to admit that it probably will be that some of the individual petitioners will not attend a desegregated school in the Davidson County system. This would be true in any instance where such a plan is adopted, and as pointed

out in the testimony of the Superintendent of Schools, the school board is the school board of all of the children and all in any given category must be treated alike. It thus results that if the relief sought by the petitioners were granted a plan which has already been found to be workable in the immediate area would in effect be destroyed.

The argument is made that other circuit courts have approved decisions granting individual litigants relief as exceptions to a general desegregation program (Petitioners' Brief, p. 24). Petitioners overlook the very clear distinction between those cases and the case at bar, which was pointed out by Mr. Justice (then Judge) Stewart in the case of **Clemons v. Board of Education**, supra, where the distinction is noted between cases where racial segregation on the part of the school authorities was required or permitted by the state and any change would require the uprooting of a system of education based upon decades of state custom and state law, on the one hand, and cases, such as the **Clemons** case, where segregation had been contrary to the law of the state for almost seventy years. This distinction is clearly set forth in the opinion at page 859 in the following language:

> "In the cases recently decided by the Supreme Court racial segregation on the part of the school authorities was required or permitted by the states involved. The Court recognized in its second opinion in those cases that the transition to an integrated school system in such states would involve many difficult practical problems, varying in each locality, but in each locality requiring the uprooting of a system of education built upon decades of state custom and state law. . . .
>
> By contract the segregation of school children because of their race has been contrary to the law of Ohio for almost seventy years. . . . I think the ap-

pellants were clearly entitled to injunctive relief as a matter of right **in this case**" (Emphasis ours).

Nor do the cases cited by petitioners in their brief require a different conclusion from that rendered by the District Judge. It is true that where the District Court has found that the admission of one or two students to classes not integrated under the plan would not adversely affect the plan, such exercise of discretion and recognition of responsibility by the district judge will not be summarily overruled by the appellate court (See, for example, **Board of Education v. Groves**, Fourth Cir., 261 F. 2d 527). But where there is a reason, as there was here, and as found by the District Judge, that admission of the plaintiffs under an injunction would disrupt the plan, then the District Court has exercised its responsibility to determine whether the plan is reasonable in all its aspects, including the duty of determining whether an exception to the plan in a given case should be made.

CONCLUSION.

The District Court has approved a plan consistent with the mandate of this Court in the **Brown** case; a plan which experience has proven to be workable. The District Court has retained jurisdiction to insure that the plan does work and is not used to deprive any person of a constitutional right. What would appear to be a conflict between the circuits is not in effect a real conflict at all when fully considered, as herein pointed out. The questions sought to be raised by this petition are not of sufficient importance to justify granting of the writ and review of a decision so well considered by both the District and Circuit Courts.

Accordingly respondents respectfully submit that the petition for certiorari should be denied and the school

system of Davidson County permitted to continue its orderly integration under the direct scrutiny of the District Court.

Respectfully submitted,

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